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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROBERTA FRANK, an individual, and)
all others similarly situated,)

Plaintiff,)

vs.)

CANNABIS & GLASS, LLC, a)
Washington limited liability company;)
NXNW Retail, LLC, a Washington)
limited liability company; and TATE)
KAPPLE and his marital community,)

Defendants.)

Case No.: 2:19-CV-0250-SAB

**PLAINTIFF'S UNOPPOSED
MOTION FOR AWARD OF
ATTORNEYS' FEES, COSTS, AND
SERVICE AWARD**

**Hearing Date/Time: April 12, 2022 at
10:00 a.m.**

PLAINTIFF'S UNOPPOSED MOTION FOR AWARD OF ATTORNEYS'
FEES, COSTS, AND SERVICE AWARD

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I. INTRODUCTION

Consistent with the parties' Settlement Agreement, Class Representative Roberta Frank and Class Counsel request that the Court award combined attorneys' fees and costs of \$150,000 and further approve a combined statutory damages and service award payment of \$10,000 for Class Representative Frank. Ms. Frank and Class Counsel vigorously litigated this case for a substantial amount of time before negotiating a settlement that required Defendants to establish a settlement fund in the amount of \$828,000 which will be used to issue Class Members' voucher payments, class administration costs, a Class Representative service award, and Class Counsel's attorneys' fees and costs. (ECF No. 53, ¶¶ 11-14). If the Court approves the settlement, and all Class Members participate, \$618,000 in voucher payments will be distributed to no more than 10,300 class members resulting in a payment of \$60.00 per Class Member. (ECF No. 53, ¶ 11).

Class Counsel has devoted a substantial number of hours to the prosecution of this case. (Miller Dec, ECF No. 59 ¶ 30, Ex. A). In addition, the fee request includes the amount in litigation costs that Class Counsel has incurred. (*Id.*). The requested \$150,000 in combined attorneys' fees and costs is less than the commonly applied Ninth Circuit 25 percent benchmark. The combined statutory damages and service award payment Class Representative Frank seeks is reasonable given the recovery obtained and the risk undertaken. Accordingly,

1 Class Counsel and Ms. Frank request this Court grant their motion. Defendants do
2 not oppose this motion.

3 II. ARGUMENT AND AUTHORITY

4 A. Plaintiff and Class Counsel vigorously litigated on behalf of the Class.

5 Since this case was filed in June of 2019, Ms. Frank and Class Counsel
6 researched and investigated Defendants' corporate structures and business
7 practices, engaged in extensive discovery, argued contested motions, and reviewed
8 and analyzed documents and data to ascertain a reasonable range of damages.
9 (ECF No. 53, ¶ 8). In February of 2020, the matter was stayed for the parties to
10 engage in mediation with Honorable Frederick P. Corbit and Career Law Clerk
11 Julia D. McGann of the U.S. Bankruptcy Court for the Eastern District. (*Id.* at ¶ 9).
12 The parties' mediation efforts included extensive good faith, arm's length
13 negotiations via Zoom, email, and telephone, and after several months, the parties
14 were able to come to an amicable settlement of the matter. (*Id.*).

15 On December 27, 2021, this Court preliminarily certified a class of:

16 All persons residing in the State of Washington who received one or more
17 unsolicited commercial Text Messages transmitted by or on behalf of C&G
18 Defendants on or after June 22, 2015, and through the date this class is
19 certified by the Court (December 27, 2021).

20 Excluded from the Settlement Class are (1) Defendants, and their immediate
families (as applicable); (2) officers, members, partners, managers, directors,
and employees of Defendants, and their respective immediate families; (2)
legal counsel for all parties in the Action, and their immediate families; (3)

1 the presiding Judge in the Action, and any members of the Judge's staff and
2 immediate family; and (4) all persons who validly request exclusion from
the Settlement Class.

3 (ECF Nos., 52, 54).

4 **B. Plaintiff and Class Counsel negotiated an outstanding settlement for**
5 **Class members.**

6 Following extensive rounds of mediation with Honorable Frederick P.
7 Corbit and Career Law Clerk Julia D. McGann, the parties reached a class-wide
8 settlement agreement. (ECF No. 53, ¶ 9). The settlement required Defendants to
9 establish a settlement fund in the amount of \$828,000 to pay Class Members, class
10 administration costs, a Class Representative service award, and Class Counsel's
11 attorneys' fees and costs. (ECF No. 53, ¶¶ 11-14). If the Court approves the
12 Settlement, and all Class Members make a valid claim, \$618,000 will be divided
13 evenly by no more than 10,300 Class Members resulting in payments of \$60 in
14 vouchers to each Class Member, which may be used on any products in the
15 Defendants' stores. (*Id.* at ¶ 11; ECF No. 53-1, at III.C.1.d.). Given the alleged
16 uncertainty of the claims and the guaranteed payment of a benefit to Class
17 Members who submit claims, the result is exceptional.

18 As part of the Settlement, Defendants agreed to not contest a service award
19 of \$10,000 to Ms. Frank and Class Counsel's attorneys' fees and costs up to

20 ///

1 \$150,000. (*Id.* at ¶¶ 13, 14). Defendants also agreed to pay all class administration
 2 costs under \$50,000 which the parties are on track to accomplish. (*Id.* at ¶ 12).

3 Furthermore, through this litigation, Defendants have amended their text
 4 marketing practices to comply with CEMA and the TCPA. (ECF No. 59, ¶ 34).

5 **C. Class Counsel requests a reasonable award of attorneys’ fees and costs.**

6 “Attorneys’ fees provisions included in proposed class action settlement
 7 agreements are, like every other aspect of such agreements, subject to the
 8 determination whether the settlement is ‘fundamentally fair, adequate, and
 9 reasonable.’” *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir 2003) (quoting Fed.
 10 R. Civ. P. 23(e)). “The plain text of [Fed. R. Civ. P. 23(h)] requires that any class
 11 member be allowed an opportunity to object to the fee ‘motion’ itself.” *In re*
 12 *Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993-994 (9th Cir. 2010). Class
 13 Counsel are submitting their fee motion in advance of final approval, as required
 14 by *In re Mercury Interactive Corp.*, and will address any objections in their motion
 15 for final approval.

16 **1. The Court should not consider the value of the vouchers redeemed in**
 17 **determining the reasonableness of Class Counsel’s request for**
 18 **attorneys’ fees because CAFA, 28 U.S.C. § 1711, does not apply to**
 19 **class settlements that offer vouchers for free products.**

20 *In re HP Inkjet Printer Litigation*, 716 F.3d 1173 (9th Cir. 2013) addressed
 the calculation of attorneys’ fees in the context of a coupon settlement under

1 CAFA. The court held that “[i]f a settlement gives coupon and equitable relief, and
2 the district court sets attorneys’ fees based on the value of the entire settlement,
3 and not solely on the basis of injunctive relief, then the district court must use the
4 value of the coupons redeemed when determining the value of the coupons part of
5 the settlement.” *Id.* at 1184.

6 In *InkJet* “e-credits” in the amount of \$2 to \$6 dollars were determined to be
7 “coupons” and thus an award of attorneys’ fees was subject to determining the
8 value of the coupons redeemed. *Id.* at 1177. In later Ninth Circuit cases, as CAFA
9 did not define the ambiguous term “coupon,” the Ninth Circuit relied on CAFA’s
10 legislative history to determine its meaning, and further, what constitutes a
11 “coupon settlement” subject to CAFA’s attorney’s fees scrutiny. *See In re Online*
12 *DVD-Rental Antitrust Litig.*, 779 F.3d 934, 950 (9th Cir. 2015). In doing so, the
13 Ninth Circuit determined that vouchers which allow class members to purchase
14 actual products (versus coupons that simply offer discounts on products) are not
15 “coupons” within the meaning of CAFA. *See Id.* at 951-52 (finding that settlement
16 which offered \$12 Walmart gift cards to class members was not a “coupon
17 settlement” within CAFA because entire products could be obtained with the gift
18 cards, were not just a reduction in purchase price of an item, and did not require
19 class members to spend their own money); *see also Seebrook v. Children's Place*
20 *Retail Stores, Inc.*, No. C 11-837 CW, 2013 WL 6326487, at *2 (N.D. Cal. Dec. 4,

2013) (finding that a \$10 merchandise certificate is not a coupon and thus does not trigger the provisions of 28 U.S.C. § 1712); *and Foos v. Ann, Inc.*, 2013 WL 5352969 at * 3 (S.D. Cal. Sept. 24, 2013) (finding that a \$15 voucher which allowed class members to obtain merchandise from the store was not a “coupon” and thus attorneys’ fees request was not subject to 28 U.S.C. § 1712’s scrutiny).

Here, a tangible monetary benefit is provided to the Class Members. Class Members who make valid claims will be entitled to a total of \$60 in four separate \$15 vouchers that can be used to purchase products in the Defendants’ stores without any minimum purchase required and without limitation on which of Defendants’ products that may be purchased. (ECF No. 53-1, at III.C; ECF No. 53, ¶ 11). Furthermore, Defendants’ North Store advertises at least 150 different products priced at \$15 or less. (ECF No. 59, ¶ 35). As such, the Class Members have a multitude of potential selections without having to pay any additional monies out-of-pocket. *See Seebrook*, No. C 11-837 CW, 2013 WL 6326487, at *2 (in holding that 28 U.S.C. § 1711 did not apply to the requested attorneys’ fee award in that case, noting that a large amount of merchandise at that defendant’s store was priced at equal to or less than the \$10.00 voucher amount, as opposed to *Inkjet*, where nothing could be obtained on that defendant’s website for the amount of “e-credits” given); *see also In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 950 (9th Cir. 2015) (noting that \$12 at Walmart, is still \$12).

1 Accordingly, the Court should not analyze the reasonableness of Class
2 Counsel's attorney fee request based on the value of the vouchers actually
3 redeemed in this matter.

4 **2. The percentage-of-the-fund method is the appropriate calculation for**
5 **attorneys' fees in this case.**

6 When a coupon settlement under CAFA is not at issue, District courts have
7 discretion to use either the percentage-of-the-fund method or the lodestar method
8 to calculate a reasonable attorneys' fee from a common fund established by a class
9 action settlement. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir.
10 2002); *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d at 993-994. The
11 method a district court chooses to use, and its application of that method, must
12 achieve a reasonable result. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654
13 F.3d 935, 942 (9th Cir. 2011) ("Though courts have discretion to choose which
14 calculation method they use, their discretion must be exercised so as to achieve a
15 reasonable result."). As the Ninth Circuit has instructed, "[r]easonableness is the
16 goal, and mechanical or formulaic application of either method, where it yields an
17 unreasonable result, can be an abuse of discretion." *In re Coord. Pretrial*
18 *Proceedings in Petroleum Prods. Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir.
19 1997). Notwithstanding, the percentage-of-the-fund method is generally considered
20 the appropriate method for calculating fees when, as in this case, a common fund

1 has been created. *See, e.g., In re Bluetooth*, 654 F.3d at 942 (“Because the benefit
2 to the class is easily quantified in common-fund settlements, we have allowed
3 courts to award attorneys a percentage of the common fund in lieu of the often
4 more time-consuming task of calculating the lodestar.”); *In re Omnivision Techs.,*
5 *Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) (observing that “use of the
6 percentage method in common fund cases appears to be dominant” and discussing
7 its advantages over the lodestar method).

8 Under the percentage-of-recovery method, the attorneys’ fees equal some
9 percentage of the common settlement fund; in this circuit, the benchmark
10 percentage is generally 25 percent. *In re Bluetooth Headset Prods. Liab. Litig.*, 654
11 F.3d at 942; *Paul, Johnson, Alston & Hunt v. Graulity*, 886 F.2d 268, 272 (9th
12 Cir.1989); *see also Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d
13 1301, 1311 (9th Cir. 1990) (citing *3 Newberg on Class Actions*, § 14.03 (20–30
14 percent is usual common fund award) and *In re GNC Shareholder Litigation: All*
15 *Actions*, 668 F.Supp. 450, 452 (W.D.Penn.1987) (awarding 25 percent attorneys’
16 fees from common settlement fund of over \$2 million)).

17 Notwithstanding the 25 percent benchmark, Ninth Circuit courts have
18 routinely approved percentages larger than the benchmark. *See, e.g., In re Pac.*
19 *Enters. Secs. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming an award equal to
20 33 percent of the common fund); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454,

1 460, 463 (9th Cir. 2000) (affirming award of attorneys' fees equal to 33 percent of
2 the total recovery); *Brown v. Consumer Law Assoc., LLC*, No. 11-CV-0194-TOR,
3 2013 WL 2285368, at *4 (E.D. Wash. May 23, 2013) (30 percent of the common
4 fund); *In re HQ Sustainable Maritime Indus., Inc. Derivative Litig.*, No. C11-910
5 *RSL*, 2013 WL 5421626, at *3 (W.D. Wash. Sept. 26, 2013) (30 percent of the
6 common fund); *In re Activision Secs. Litig.*, 723 F. Supp. 1373, 1379 (N.D. Cal.
7 1989) (32.8 percent); *In re Ampicillin Antitrust Litig.*, 526 F. Supp. 494, 500
8 (D.D.C. 1981) (45 percent of \$7.3 million settlement fund); *Dennings v. Clearwire*
9 *Corp.*, No. C10-1859JLR, 2013 U.S. Dist. LEXIS 64021 (W.D. Wash. May 3,
10 2013) (35.78 percent fee).

11 This holds true even in instances where the class recovery runs into the
12 millions of dollars. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 463 (confirming
13 award of 33.33 percent of the \$1.75 million recovery); *Brown v. Consumer Law*
14 *Assoc., LLC*, No. 11-CV-0194-TOR, 2013 WL 2285368, at *4 (awarding 30
15 percent of the \$1.15 million common fund); *In re Activision Secs. Litig.*, 723 F.
16 Supp. at 1379 (awarding 32.8 percent in fees and expenses of the near \$4.75
17 million settlement).

18 Here, the percentage-of-the-fund method is the appropriate method for
19 determining a reasonable fee in this case. The benefit to the class is easily
20 quantified. Class Counsel's efforts resulted in a \$828,000 common fund, which

will be distributed to all Class Members who submit valid claim forms, and includes all administration expenses, Court-approved attorneys' fees and costs, and a Court-approved service award. (ECF No. 53, ¶¶ 11-14).

3. A fee award below the Ninth Circuit's benchmark of 25 percent of the Settlement Fund will fairly compensate Class Counsel for their work on behalf of the Settlement Class.

As noted above, The Ninth Circuit has instructed that 25 percent is "a proper benchmark figure," with common fund fees typically ranging from 20 to 30 percent of the fund." *In re Coordinated Pretrial Proc. in Petroleum Prod. Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997) (citation omitted). A district court must "adequately explain" the special circumstances justifying departure from the 25 percent benchmark. *In re Bluetooth*, 654 F.3d at 942. The 25 percent benchmark is the starting point for the analysis, and the percentage may be adjusted up or down based on the court's consideration of "all of the circumstances of the case." *Vizcaino*, 290 F.3d at 1048. The relevant circumstances include (1) the results achieved for the class, (2) the risk counsel assumed, (3) the skill required and the quality of the work, (4) the contingent nature of the fee, (5) whether the fee is above or below the market rate, and (6) awards in similar cases. *Id.* at 1048–50. Consideration of "the circumstances of the case," *Vizcaino*, 290 F.3d at 1048, confirms that an award at the 25 percent benchmark is appropriate.

///

1 Awarding the 25 percent benchmark rate ensures that attorneys are not penalized
2 for efficient litigation on meritorious claims.

3 **a. Class Counsel achieved an excellent result for the class.**

4 The Settlement Agreement requires Defendant to pay \$828,000 into the
5 Settlement Fund and all of the 10,300 Settlement Class Members who make valid
6 claims will be entitled to compensation in the form of four \$15 vouchers (\$60
7 total). (ECF No. 53, ¶ 11). This recovery represents 12 percent of the assured total
8 damages under CEMA the Court could award, meeting similar settlements
9 approved by other courts. *Cavnar v. BounceBack, Inc.*, No. 2:45-CV-235-RMP,
10 ECF No. 154 (E.D. Wash. Sept. 15, 2015)¹ (approving settlement providing 15.6
11 percent of alleged unlawful collection fees paid by class members alleging FDCPA
12 and Consumer Protection Act violations); *In re Mego Fin. Corp. Sec. Litig.*, 213
13 F.3d at 459 (affirming the district court's approval of a settlement estimated to be
14 worth between 16.67 and 50 percent of class members' estimated losses). The
15 amount of recovery per class member is also not affected by Class Counsel's
16 request for attorneys' fees and the Class Representative's request for an incentive
17 ///

18
19 ¹ Attorney Kirk D. Miller was one of the appointed Class Counsel in this case. In
20 order to facilitate the settlement, all plaintiff attorneys on this case accepted
approximately ½ of Lodestar attorney fees.

award, as Defendant has agreed to pay those awards in their requested amounts if approved by the Court. (ECF No. 53, ¶¶ 12-14).

b. Class Counsel assumed significant risk in prosecuting this action for nearly three (3) years.

Class Counsel's fee request reflects that the case was risky and handled on a contingency basis. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 954-55. Class Counsel invested hundreds of hours of work into the case over for nearly three years and also advanced significant litigation costs. (ECF No. 53, ¶ 8; ECF No. 59, ¶ 30, Ex. A); *Vizcaino*, 290 F.3d at 1048; *see also Jenson v. First Tr. Corp.*, No. CV 05-3124 ABC, 2008 WL 11338161, at *12 (C.D. Cal. June 9, 2008) ("Uncertainty that any recovery ultimately would be obtained is a highly relevant consideration. Indeed, the risks assumed by Counsel, particularly the risk of non-payment or reimbursement of expenses, is important to determining a proper fee award.") (internal citation omitted).

Class Counsel represented Plaintiff and the Class entirely on a contingent basis. (ECF No. 60, ¶ 6; ECF No. 59, ¶ 27; ECF No. 61, ¶ 9). Courts recognize that awarding contingent fees that often exceed fees for services provided on a non-contingent basis is necessary to encourage counsel to take on plaintiffs' cases who otherwise could not afford to pay hourly fees. *In re Wash. Public Power Supply Sys. Secs. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994). Here, as in many consumer

1 class actions, there was also a very real risk that Class Counsel would not recover
 2 their fees and costs at all. *See Bund v. Safeguard Properties, Inc.*, 2018 WL
 3 5112642 (W.D. Wash. Oct. 19, 2018) (class action case decertified and dismissed
 4 after years of litigation, without attorneys receiving any fees).

5 **c. Class Counsel produced high quality work reflecting their skill**
 6 **and experience.**

7 Class Counsel proceeded with a novel CEMA claim under Washington law
 8 with extremely limited case law and statutory guidance. Class Counsel pioneered
 9 this cause of action to represent a class of litigants who are historically underserved
 10 and whose individual damages would likely not inspire many other attorneys in
 11 this region to meet with them, much less consider representing them. Class
 12 Counsels' skill and experience allowed them to gather the evidence necessary to
 13 apply pressure on Defendants to settle this case for \$828,000.

14 **d. Class Counsel's requested fee is at the market rate and consistent**
 15 **with awards in similar consumer cases.**

16 The Ninth Circuit consistently approves a 25 percent benchmark for
 17 awarding attorney's fees and costs out of common funds. *Bellinghausen v. Tractor*
 18 *Supply Co.*, 306 F.R.D. 245, 260 (N.D. Cal. 2015); *see also e.g., Forbes v. Am.*
 19 *Bldg. Maint. Co. W.*, 170 Wn.2d 157, 161–66, 240 P.3d 790 (2010) (40 percent
 20 contingency fee based on the \$5 million settlement was fair and reasonable);
Ikuseghan v. Multicare Health Sys., 2016 WL 4363198 (W.D. Wash. Aug. 16,

2016) (awarding 30 percent of common fund); *Vizcaino*, 290 F.3d at 1047 (affirming award of 28 percent of the common fund by United States District Court for the Western District of Washington); *Desio v. Emercon Elec. Co.*, No. 2:15-CV-00346-SMJ, ECF No. 84 (E.D. Wash. Feb. 7, 2018) (awarding 25 percent of the common fund).

Here, Plaintiff and Class Counsel request combined attorneys' fees and costs totaling \$150,000. (ECF No. 53, ¶ 14). As the total recovery to the class is \$828,000, Class Counsel's requested \$150,000 attorneys' fees and costs award is below the Ninth Circuit's 25 percent benchmark, and less than amounts typically awarded in similar cases. (*Id.*).

4. The lodestar method as a cross-check illustrates that Class Counsel's request for attorneys' fees is reasonable.

One way that a court may demonstrate that its use of a particular method or the amount awarded is reasonable is by conducting a cross-check using the other method. For example, a cross-check using the lodestar method "can confirm that a percentage of recovery amount does not award counsel an exorbitant hourly rate." *Bluetooth*, 654 F.3d at 945 (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 n. 40 (3rd Cir. 1995)).

The lodestar method may be employed where, a fee-shifting statute authorizes "the award of fees to ensure compensation for counsel undertaking

1 socially beneficial litigation.” *Bluetooth*, 654 F.3d at 941. Here, one of the
2 preliminarily certified claims arises under a statute that provides for fee-shifting to
3 encourage litigation in the public interest. *See* RCW 19.86.090.

4 The Ninth Circuit also recognizes that the lodestar method is appropriate
5 “when special circumstances indicate that the percentage recovery would be either
6 too small or too large in light of the hours devoted to the case or other relevant
7 factors.” *Six {6} Mexican Workers*, 904 F.2d at 1311. “Under the
8 lodestar/multiplier method, the district court first calculates the ‘lodestar’ by
9 multiplying the reasonable hours expended by a reasonable hourly rate.” *In re*
10 *Wash. Pub. Power*, 19 F.3d at 1295 n.2; *see also Staton*, 327 F.3d at 965. “There is
11 a ‘strong presumption’ that the lodestar figure represents the reasonable fee.” *Byles*
12 *v. Ace Parking Mgmt., Inc.*, No. C160834-JCC, 2019 WL 3936663, at 1 (W.D.
13 Wash. Aug. 20, 2019).

14 If circumstances warrant, the court may adjust the lodestar to account for
15 other factors which are not subsumed within it. *Staton*, 327 F.3d at 965 & n.17.
16 Upward adjustments may be appropriate “to account for several factors, including
17 ... the quality of the representation, the benefit obtained for the class, the
18 complexity and novelty of the issues presented, the risk of nonpayment, and any
19 delay in payment.” *Manual for Complex Litigation (Fourth 2004)* (“MCL”) §
20

1 14.122, p. 195-96; *see also In re Bluetooth*, 654 F.3d at 942. The lodestar-
2 multiplier method confirms the propriety of the requested fee in this matter.

3 Class Counsel have submitted detailed declarations and time records with
4 this motion. The time records include the number of hours worked, the work
5 performed, and the attorney or staff member who performed the work. Because the
6 case is not yet concluded, the total time spent by counsel to resolve this case will
7 continue to increase. (ECF No. 59, ¶ 31; ECF No. 60, ¶ 12). As Class Counsel's
8 time records show, Class Counsel has already spent over 300 hours litigating this
9 matter on a contingent basis to this point. (ECF No. 60, ¶ 6; ECF No. 59, ¶¶ 27, 30,
10 Ex. A; ECF No. 61, ¶ 9). These hours, multiplied by the attorneys' and staff
11 members' usual hourly rates, result in a lodestar of \$140,105, prior to any
12 multiplier, and prior to more than \$16,000 in additional anticipated time to bring
13 this matter to final approval. (ECF No. 60, ¶ 12, ECF No. 59, ¶ 27).

14 **a. Class Counsels' fee request is reasonable compared to the**
15 **Lodestar calculation.**

16 In the Ninth Circuit, multipliers "ranging from one to four are frequently
17 awarded." *Vizcaino*, 290 F.3d at 1051 n.6. Courts find higher multipliers
18 appropriate when using the lodestar method as a cross-check for an award based on
19 the percentage method. *See, e.g., Steiner v. Am. Broad Co., Inc.*, 248 F. App'x 780,
20 783 (9th Cir. 2007) (finding a multiplier of approximately 6.85 to be "well within

1 the range of multipliers that courts have allowed” when cross-checking a fee based
2 on a percentage of the fund); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294,
3 298-99 (N.D. Cal. 1995) (finding that a multiplier of 3.6 was “well within the
4 acceptable range” and explaining that “[m]ultipliers in the 3-4 range are
5 common”); *Johnson v. Fujitsu Tech. & Bus. of Am., Inc., No. 16-CV-03698-NC*,
6 2018 WL 2183253, at *7 (N.D. Cal. May 11, 2018) (finding a 4.375 multiplier to
7 be reasonable in cross-checking a fee of 25 percent of a settlement fund). Here,
8 Class Counsel requests an adjustment from Lodestar (3.64 multiplier) less than the
9 Ninth Circuit’s 4x benchmark, which makes the fee request presumptively
10 reasonable.

11 Courts may consider the following factors when assessing the
12 reasonableness of a multiplier: “(1) the time and labor required, (2) the novelty and
13 difficulty of the questions involved, (3) the skill requisite to perform the legal
14 service properly, (4) the preclusion of other employment by the attorney due to
15 acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or
16 contingent, (7) time limitations imposed by the client or the circumstances, (8) the
17 amount involved and the results obtained, (9) the experience, reputation, and
18 ability of the attorneys, (10) the ‘undesirability’ of the case, (11) the nature and
19 length of the professional relationship with the client, and (12) awards in similar
20 cases.” *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975); *see also*

1 *Vizcaino*, 290 F.3d at 1051 (noting that the district court found a 3.65 multiplier to
2 be reasonable after considering the factors in *Kerr*).

3 Here, Class Counsel, as a lodestar crosscheck to the reasonableness of their
4 requested fee, do not need a multiplier applied to their lodestar to reach the
5 combined requested amount of attorney's fees and costs of \$150,000.

6 **b. Class Counsel expended a reasonable number of hours litigating**
7 **this case.**

8 The more than 300 hours Class Counsel has devoted to investigation,
9 discovery, motion practice, and achieving a favorable settlement are reasonable.
10 *See Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008) ("The
11 number of hours to be compensated is calculated by considering whether, in light
12 of the circumstances, the time could reasonably have been billed to a private
13 client."). Class Counsel spent a substantial amount of time litigating Plaintiff's
14 claims in this lawsuit. (ECF No. 53, ¶¶ 8, 9). These efforts included investigating
15 Defendants' corporate structures and business practices, engaging in extensive
16 discovery, arguing contested motions, reviewing and analyzing documents and
17 information and data to ascertain a reasonable range of damages, and participating
18 in lengthy negotiations and mediation. (*Id.*).

19 Negotiating a settlement that provides Class Members with significant
20 monetary compensation required considerable effort. Class Counsel prepared for

1 the formal mediation by compiling damages models from Defendant’s available
2 data and preparing argument for Plaintiff’s claims. Negotiations continued for an
3 extended period of time after formal mediation. (ECF No. 53, ¶ 9). The parties
4 ultimately agreed to a Settlement that required Defendants to establish a settlement
5 fund in the amount of \$828,000, which will be used to pay the class members,
6 class administration costs, a Class Representative service award, and Class
7 Counsel’s attorneys’ fees and costs, and further, will ensure Defendants comply
8 with applicable text marketing laws going forward. (ECF No. 53, ¶¶ 11-14).

9 A court may reduce the overall number of hours only when it specifically
10 finds that the work was “unnecessarily duplicative.” *Moreno*, 534 F.3d at 1113.
11 “One certainly expects some degree of duplication as an inherent part of the
12 process. There is no reason why the lawyer should perform this necessary work for
13 free.” *Id.* at 1112. Courts are particularly reluctant to reduce hours for duplication
14 where, as here, counsel worked on a contingency fee basis. *Id.* As the Ninth Circuit
15 noted, “lawyers are not likely to spend unnecessary time on contingency cases in
16 the hope of inflating their fees. The payoff is too uncertain, as to both the result
17 and the amount of the fee.” *Id.* Thus, “[b]y and large, the court should defer to the
18 winning lawyer’s professional judgment as to how much time was required to
19 spend on the case; after all, he won, and might not have, had he been more of a
20 slacker.” *Id.*

1 Here, Class Counsel, in a wholly contingency fee case, exercised discretion
2 in their work performed so as to avoid expending unnecessary time litigating this
3 matter and inflating their fees.

4 **c. Class Counsel’s rates are consistent with community rates for**
5 **similar attorneys’ work of comparable skill, experience, and**
6 **reputation.**

7 In determining a reasonable rate, the court considers the “experience, skill
8 and reputation of the attorney requesting fees.” *Trevino v. Gates*, 99 F.3d 911, 924
9 (9th Cir. 1996). Courts also look at the prevailing market rates in the relevant
10 community, which is the forum in which the district court sits. *Gonzalez v. City of*
11 *Maywood*, 729 F.3d 1196, 1205 (9th Cir. 2013). Courts approve rates that are
12 comparable to “the fees that private attorneys of an ability and reputation
13 comparable to that of prevailing counsel charge their paying clients for legal work
14 of similar complexity.” *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 946 (9th Cir.
15 2007); *see also Dang v. Cross*, 422 F.3d 800, 813 (9th Cir. 2005) (hourly rates are
16 reasonable if they fall within the range of “prevailing market rates in the relevant
17 community” given “the experience, skill, and reputation of the attorney”). Courts
18 consider declarations from Class Counsel and fee awards in other cases as
19 evidence of prevailing market rates. *Welch*, 480 F.3d at 947.

20 The Eastern District, in cases involving consumer class actions from more
than eight years ago, approved contingent rates above the requested rates in this

1 matter. *Brown v. Consumer Law Assocs. LLC*, Case No. CV-11-0194-TOR, ECF
2 Nos. 211, 212 & 227 (approving rates up to \$540); *Bronzich v. Persels & Assocs.,*
3 *LLC*, Case No. CV-10-00364-TOR (E.D. Wash. Jan. 25, 2013), ECF Nos. 296, 297
4 & 311 (approving rates up to \$530).

5 In the Western District, courts have regularly approved as reasonable hourly
6 rates billed by attorneys up to \$650, paralegals up to \$185, and litigation staff up to
7 \$125. *See, e.g., Pelletz*, 592 F. Supp. 2d at 1326 (finding attorney fee rates for
8 partners of \$575, \$660, \$760, and \$800 per hour to be reasonable); Final Approval
9 Order and Final Judgment at 7, *Miller v. PSC, Inc.*, No. 3:17-CV-05864-RBL
10 (W.D. Wash. Jan. 10, 2020), ECF No. 75 (approving partner rates of \$400-\$550
11 per hour, associate rate of \$325 per hour, paralegal rate of \$175, and litigation staff
12 rate of \$125 per hour); *Rinky Dink v. World Business Lenders, LLC*, No. 2:14-CV-
13 0268-JCC (W.D. Wash. May 31, 2016), ECF No. 92 at 7-8 (approving partner
14 rates of \$500-\$650 per hour, associate rates of \$250-\$400 per hour, paralegal rate
15 of \$250, and litigation staff rates of \$100-\$200).

16 Class Counsel's hourly rates of \$450-\$525, paralegals at \$150, and \$90 for
17 litigation staff are well within, if not below, the prevailing market range. (ECF No.
18 60, ¶ 10, ECF No. 59, ¶ 23, ECF No. 61, ¶ 11). Class Counsel have provided the
19 Court with declarations describing the basis for their hourly rates, including their
20 education, legal experience, and reputation in the legal community. (ECF Nos. 59,

60 and 61). Class Counsel sets the rates for attorneys and staff members based on a variety of factors, including the experience, skill and sophistication required for the types of legal services typically performed, the rates customarily charged in the market, and the experience, reputation and ability of the attorneys and staff members. (ECF No. 61, ¶ 12, ECF No. 59, ¶ 24, ECF No. 60, ¶ 10). Because their rates are in line with contingent rates approved in this district, Class Counsel's hourly rates are reasonable.

D. Class Counsel's costs were necessarily and reasonably incurred.

Class Counsel's fee request includes reimbursement of \$1,475 in litigation costs expended in litigating this case. (ECF No. 59, ¶ 30, Ex. A). As courts in this circuit have recognized, "[t]he Ninth Circuit allows recovery of pre-settlement litigation costs in the context of class action settlement. Reimbursement of reasonable costs is fully in keeping with applicable law." *Arthur v. Sallie Mae, Inc.*, No. 10-CV-00198-JLR, 2012 WL 4076119, at 2 (W.D. Wash. Sept. 17, 2012) (internal citations omitted); *see also Corson v. Toyota Motor Sales U.S.A., Inc.*, No. CV 12-8499-JGB, 2016 WL 1375838, at 9 (C.D. Cal. Apr. 4, 2016) ("Expenses such as reimbursement for travel, meals, lodging, photocopying, long-distance telephone calls, computer legal research, postage, courier service, mediation, exhibits, documents scanning, and visual equipment are typically recoverable"); *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2013 WL

1 496358, at 6 (N.D. Cal. Feb. 6, 2013) (awarding costs for document review,
2 depositions, and experts). Class Counsel provided the Court with a chart listing
3 their costs by category. (ECF No. 59, ¶ 30, Ex. A).

4 **E. Class Representative Frank requests a reasonable service award.**

5 Service awards are “fairly typical in class actions.” *Barovic v. Ballmer*, Nos.
6 C14-0540 JCC, *et al.*, 2016 WL 199674, at 5 (W.D. Wash. Jan. 13, 2016) (citation
7 omitted). They “are intended to compensate class representatives for work done on
8 behalf of the class, to make up for financial or reputational risk undertaken in
9 bringing the action, and, sometimes, to recognize their willingness to act as a
10 private attorney general.” *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958-59 (9th
11 Cir. 2009). Service awards “help promote the public policy of encouraging
12 individuals to undertake the responsibility of representative lawsuits.” *Byles*, 2019
13 WL 3936663, at 2.

14 The criteria courts consider when determining whether to make an incentive
15 award and the amount of the award include the risk to the class representative, both
16 financial and otherwise, the notoriety and personal difficulties encountered by the
17 class representative, the amount of time and effort spent, the duration of the
18 litigation, and the personal benefit enjoyed by the class representative as a result of
19 the litigation. *Carideo v. Dell, Inc.*, No. 06-CV-01772-PET, 2010 WL 11530555,
20 at 3 (W.D. Wash. Dec. 17, 2010).

1 Class Representative Frank requests a combined statutory damage and
2 service award payment of \$10,000 in recognition of her service to the Class. (ECF
3 37, ¶ 15). Ms. Frank assisted in investigating the Defendants' practices, drafting
4 the complaint, and participated extensively with Class Counsel in negotiating an
5 agreed settlement in this matter. (ECF No. 53, ¶ 13).

6 Her requested service award is on par with those commonly awarded in the
7 Ninth Circuit. *See, e.g., Hughes v. Microsoft Corp.*, C98–1646C, 93–0178C, 2001
8 WL 34089697, at *12–*13 (W.D. Wash. Mar. 26, 2001) (approving incentive
9 awards of \$7,500, \$25,000, and \$40,000); *Pelletz v. Weyerhaeuser Co.*, 592 F.
10 Supp. 2d 1322, 1330 (W.D. Wash. 2009) (awarding \$7,500 payments to four
11 different class representatives); *Veridian Credit Union v. Eddie Bauer LLC*, No.
12 2:17-CV-00356 JLR, 2019 WL 5536824, at 3 (W.D. Wash. Oct. 25, 2019)
13 (approving service award of \$10,000); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d
14 454, 457, 463 (9th Cir. 2000) (District Court did not abuse its discretion in
15 awarding \$5,000 incentive payments to multiple class representatives where a
16 \$1.725 million common fund was created).

17 III. CONCLUSION

18 For the foregoing reasons, Class Representative Frank and Class Counsel
19 requests the Court to grant their motion, to be determined at the Final Fairness
20 hearing set for April 12, 2022, at 10:00 a.m.

1 RESPECTFULLY SUBMITTED and DATED this 26th day of January 2022.

2 KIRK D. MILLER, P.S.

3 s/ Kirk D. Miller

Kirk D. Miller, WSBA #40025

4 CAMERON SUTHERLAND, PLLC

5 s/ Shayne J. Sutherland

6 Shayne J. Sutherland, WSBA #44593

Brian G. Cameron, WSBA #44905

7 *Attorneys for Plaintiff and Class*

CM/ECF CERTIFICATE OF SERVICE

I certify that on January 26, 2022, I caused a copy of the foregoing document to be filed with the Clerk of the Court via the CM/ECF system. Pursuant to their ECF Agreement, the Clerk will send notice of this filing to the following person(s) as follows:

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